No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation),
Plaintiff in Error,

vs.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,
Attorney for Plaintiff in Error.

Filed

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By .... *Deputy Clerk.*

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Herein an attempt will be made to answer only that portion of the brief of defendant in error that seems material to the issues involved in this case.

There is some difference between Mr. Cannon and myself as to the proper interpretation to be given to the evidence in certain particulars. It would seem, however, that the case must be determined on questions of law, which are not affected by this divergence of opinion. I shall, therefore, proceed to a consideration of those legal questions.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

Counsel claims that there was no misconduct on his part in bluntly telling the jury that there is indemnity insurance against the accident complained of and that the indemnifying company is making a defense through its own counsel. He cites no case as authority for his contention, but relies upon a bare supposition that the juror under examination might have been the president of the indemnifying company. The answer is that he was not. We have no such case. Until such a case is reached, it is not necessary to decide it. All of the authorities cited in the opening brief sustain the proposition that it is improper for plaintiff's counsel in cases of this character to inform the jury *in any manner* of the existence of accident insurance.

Granting, however, for the purposes of argument, that the talesman under examination was the president of an indemnifying company, we find that the

Code of Civil Procedure, Sec. 602, Subd. 3,

provides that a challenge for cause may be taken where the talesman is a surety on any bond or obligation for either party. This being true, it was only necessary for counsel to show those facts, and he could have done so without violating the obvious right of the defendant to a fair trial. By appropriate examination he could have shown that the talesman was the president of a corporation and that that corporation was a surety on a bond or obligation for

defendant. He then would have been entitled to his challenge without specifying the nature of the bond or obligation. So, likewise, with perfect propriety, he could have stated to the trial Judge that the reason for his question was to ascertain whether or not the talesman, or any corporation with which he was connected, was a surety on any bond or obligation for the defendant. He would then have answered the question of the Judge properly and would not have bluntly stated to all the jurors a fact most detrimental to the interests of defendant.

The Court did not then and there instruct the jury to disregard the statement of counsel. What the Judge really said was: "I *will develop* what the fact is. * * * I will instruct the jury to pay no attention to the remark of counsel, *unless it should appear it is a pertinent fact.*" This cannot be construed into a present instruction. The Judge distinctly says that he will "develop" the matter, and if it should prove not to be pertinent, *then* he will instruct the jury to pay no attention to it. In other words, the Court promised to deal with the matter and took the burden upon his own shoulders. And by overruling the objection made by appellant's counsel and failing in its promise, the Court laid its approval on the statement of counsel that there is indemnity insurance against this accident and that the insurance company is defending this case, so that it went to the jury with all the force and effect of evidence.

But counsel states that a complete answer to the contention of plaintiff in error is that it did not request the Court to instruct the jury to disregard the prejudicial matter. There was no such duty on the part of the plaintiff in error. The trial Judge took the whole matter into his own hands when he stated that he would find out what the facts were and then instruct the jury. Under these circumstances, the plaintiff in error had a right to rely upon the promise of the Court and it was under no duty to propose an instruction in this connection. Besides this, many of the authorities cited in the opening brief are to the full effect that such misconduct as is here complained of cannot be cured by even an immediate instruction to the jury to disregard the occurrence. The cases cited by counsel on page eight of his brief go no further than to hold that it is the duty of any party desiring a specific instruction to propose the same to the Court. That has always been the rule, but where the Court takes a matter from counsel and promises to properly instruct the jury in connection therewith, then counsel has a right to rely on the promise and good faith of the Court.

Again, counsel says that the smallness of the verdicts in these two cases indicates that his misconduct worked no prejudice. I do not see how that follows, because it may be that but for the misconduct complained of, both verdicts would have been for defendant below.

II.

THE FOURTH ASSIGNMENT OF ERROR.

It is a curious idea of counsel that the gravamen of the cause of action in these cases is the injury in the one case and the death in the other. It requires no argument to establish that there may be a personal injury or death without any cause of action, and, consequently, the gravamen of the cause of action in these cases is the breach of the particular duty proximately causing the accident and injury, and, in the case before us, those breaches of duty on the employer's part are alleged to be the failure to afford plaintiff below a reasonably safe place in which to perform his work, and a failure to use due care in the selection of a fit and competent fellow-employe. There being two distinct breaches of duty, each of which gives the injured employe a cause of action, they may be set forth in one complaint,

Code of Civil Procedure, Sec. 427,

but they must be separately stated,

Code of Civil Procedure, Sec. 430, Subd. 5.

In this way the injured party may make his complaint "as broad as any possible theory of the case would justify", and when so stated he cannot be compelled to make an election.

Wilson v. Smith, 61 Cal. 210;
Rucker v. Hall, 105 Cal. 427;
Estrella Vineyard Co. v. Butler, 125 Cal. 234;

Remy v. Olds, 4 Cal. Unrep. 242;
Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751.

In the case at bar counsel did not follow this obvious rule of pleading, but, on the contrary, stated his two causes of action in one count. Having elected to do this, the remedy of the plaintiff in error was a motion to compel an election, as is distinctly shown in the opening brief.

But, counsel complains that his client might lose his case through a wrong election. It seems absurd that counsel, with his great experience, can be in court and not know on what basis he is asking relief. If he does not know what ground of complaint he has against the defendant below, judgment ought promptly to be entered against him. The defendant should not be compelled to pay counsel fees and the expenses of litigation in order that counsel may experiment on a cause of action.

Bearing in mind that the error complained of in this point is the refusal of the trial Court, on motion, to compel the plaintiff to elect which of two causes of action stated in one count of his complaint he will proceed on, then the cases cited by counsel on page nine of his brief, beginning with

Colomb v. Webster Mfg. Co., 84 Fed. 592,

are not at all in point. Indeed, the Colomb case seems to have been cited by mistake, as it deals solely with the question of *res adjudicata.* In the other cases, the complaint before the Court contained more than one count, and to that extent

agreed with the proposition above announced that the pleader may state his cause of action in different forms, provided, he uses separate counts. In none of those cases is the question of an election involved. The utmost that can be said of them, so far as the case at bar is concerned, is that they tend to refute the proposition maintained at page thirty-two of the opening brief, which is, that after the running of the statute of limitations, an amended complaint cannot be filed setting forth new counts containing additional grounds of negligence in cases of this character. But, so far as that is concerned, it is insisted that the California cases cited in the opening brief must control in this case. And see

In re Wilson, 117 Cal. 267,

where it is held that upon a contest of a will, instituted after its admission to probate, the grounds of the contest cannot be amended, after the lapse of the year limited for the institution of the contest, so as to add fraud as a new ground of contest or new cause of action. Still, if these California cases do not control this particular question, even then, those cited by counsel do not affect the actual error, of which complaint is made.

But, counsel makes the further point that there is no provision or authority in our Code of Civil Procedure for a motion requiring a plaintiff to elect, in cases of this character. The authority is found in Section 1003. And see

McGuire v. Drew, 83 Cal. 232;
People v. Ah Sam, 41 Cal. 650.

And see also the California cases above cited, beginning with

Wilson v. Smith, 61 Cal. 210,

where the identical motion under consideration was recognized as the proper mode of obtaining the desired relief.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

This point does not go only to the failure of the trial Judge to grant the motion of plaintiff in error for a nonsuit, but it goes to those other points stated in the opening brief:—to the error of the trial Judge in refusing to instruct the jury to return a verdict for the defendant below, and to its ruling on the petition for a new trial.

There can be no controversy relative to the duty of the employer to furnish his employe with a reasonably safe place to work where that place is permanent and prepared by the employer for the employe. I do not, however, understand exactly what the paradox of counsel has to do with the case. He says that "from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe." This is evidently a wise remark. Yet, we need no paradox to tell us that all places are surrounded by dangers of one character or another. Probably, he intends to say that under persuasion of counsel, there may be a liability found by the jury

in cases of this character where there is none in point of law.

As I understand the matter, counsel admits that there is no evidence connecting the alleged incompetency of Yokum with the accident, and that he has wholly failed to bring his case within the rule that would hold plaintiff in error responsible for the accident by reason of the employment of Yokum, an incompetent fellow-employe of plaintiff.

If this be true, this branch of the case, then, is reduced to two questions, an affirmative answer as to either of which is fatal to the case of the defendant in error. These questions are: First, does the evidence show that the missed-shot that caused the accident and injury was so concealed that it could not have been discovered by the defendant or its employes in the exercise of ordinary care? And, Second, in view of the nature of the work in which the defendant in error was engaged, does the rule requiring the employer to furnish his employe with a reasonably safe place in which to perform his work apply?

Considering these propositions in their order, it will be remembered that it is "possible for the rock to so break that it would conceal a missed-shot" (Record, p. 95). Ordinarily, there is a mound or bunch of material unbroken by the blast, which is seen at once to be a missed-hole (Record, p. 95). A missed-hole among the "lifters" is more difficult to discover than where it occurs in the upper part of the

face. The lifters are commenced a little above the level and extend quite a distance below, in order to get the bottom of the drift on a level (Record, p. 75). The holes are drilled to a depth of four or five feet (Record, p. 48), and the blast breaks out the ground to a depth of three to three and one-half feet (Record, p. 74). The new face created by the blast would, consequently, be three or three and one-half feet deeper into the rock than the old face, at which the drilling was done. It is obvious that if the entire lifter missed fire, there would be a mound or bunch of material unbroken by the blast and on the floor of the cross-cut, extending a distance of three or three and one-half feet from the new face of the cross-cut. This would be readily detected, and, of course, no such condition existed at the place of the accident. Whatever unexploded blast there was, was hidden behind the new face. This condition could be brought about in the following manner: If, before the blast, the fuses were not exactly timed, an adjoining lifter might first explode and break the rock directly across, and so disjoin the missed-shot. The outer part of this disjoined shot might explode, or it might not, but, in any event, the bottom of the blast, consisting of a hole about an inch in diameter and of a depth of a foot or a foot and a half, would remain charged with unexploded dynamite. This would be below the bottom of the cross-cut and behind the new face and so concealed that it might be impossible of detection, and yet, it would

have sufficient force on explosion to do all the damage here complained of.

The evidence in the case at bar shows that some such condition existed and caused the accident complained of. Plaintiff, his brother Frank, Yokum, Meyers, Hall, Lawrence Whitsett and Wall, all of them able to discover missed-shots, looked this face over and failed to discover the one causing the accident. To be sure, Yokum says that he did not *inspect* the bottom of this particular face after the muck was cleared away. He said that that was not his business (Record, p. 102). But, further, he says that half an hour before the accident he was there and helped Frank Whitsett line up the drill. That the muck had been cleaned out. That he looked at the face where the drill entered the face of the cross-cut, but did not see a missed-hole (Record, p. 103). The missed-hole must have been within a few inches of that which was being drilled. An inspection can be no more than an examination by sight and touch. This is exactly what Yokum did. He looked at and touched the face of this cross-cut at the point where the missed-shot lay concealed, yet, he did not discover it. No one can contend that it was the duty of the plaintiff in error to tear its mine to pieces for the purpose of discovering missed-shots and so provide an absolutely safe place for its workmen to labor. Its utmost duty, as has been pointed out, was to use ordinary care, and, under the evidence, ordinary care was used. It makes no difference whether Yokum "inspected" this face in the regular

course of his duties, or whether he inspected the same incidentally in connection with lining up the drilling machine. All of the evidence is to the effect that this particular missed-shot was so concealed that it could not have been discovered by the exercise of any reasonable degree of care. On this branch of the case, before defendant in error can recover, he must show: First, that there was a missed-shot. Second, that that missed-shot could have been discovered by a reasonable or ordinary inspection. And, Third, that plaintiff in error failed to make such an inspection. The second and third elements are not proven in this case.

Inasmuch as the employment of Yokum as a missed-shot detective was an unusual and extra precaution taken by the plaintiff in error to protect its men, I insist that the miners were not relieved of their duty to examine for missed-shots. If they were relieved at all, they were only relieved to the extent of the duty of Yokum in that connection. The miners were bound to know just how far the employment of Yokum relieved them from their duty of examining for missed-shots. Greninger, foreman of the mine, says, in his cross-examination, to Mr. Cannon:

> "There was a missed-hole man for each shift. * * * The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face clear in the course of his day's

> work, and it was his part of the mine to look after, he examined the face for the missed-holes. If it happened that the face had muck in it, he would examine as far down as possible at that time and go on to the next place. * * * That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face would depend on whether he was ordered to do so or had time to cover those grounds. If he did not have time, it was the duty of the machine men to make the examination. The machine men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work" (Record, pp. 78, 79).

Regardless of their testimony in this connection, the miners were bound by these facts relative to the employment of Yokum, and, if they were in any measure relieved from the duty of making an examination for missed-shots, it was only to the extent here indicated. And if, with all of the precautions taken by the company for the protection of its miners, this particular missed-hole escaped detection, that fact in itself is not evidence of negligence, nor could the jury, from that fact alone, guess that the company was negligent in failing to discover the missed-shot in question. The burden of proof is on the plaintiff below, and the evidence must be such that the jury can draw from it a reasonable inference that the plaintiff in error was guilty of negligence, before a case is made out. There being no such evidence in this case, it is insisted that there is a failure of proof.

Considering now the other proposition, that in view of the nature of the employment, the rule requiring the employer to furnish his employe with a reasonably safe place in which to perform his work, has no application to this case, we find that counsel admits the exception to the rule, but he asserts that this is not such case, because the employes did not have that freedom which would permit them to select the place of work; that the foreman directed them in what particular drift or cross-cut or at what particular face they were to do their drilling, and further, that they did not personally bring about the condition of danger that resulted in the accident and injury complained of.

The cases cited in the opening brief make no such exception to the application of the rule. Where the injured employe and his fellow-employes are engaged in a place of work in which the surrounding conditions are constantly changing whereby temporarily dangerous conditions arise, the employer is not bound to furnish a reasonably safe place of work. It makes no difference whether the injured employe himself brought about the dangerous conditions, or whether it was done by his fellow-employes. In the case at bar Yokum is admitted in the amended complaint to be a fellow-employe of defendant in error. Frank Whitsett was declared to be such by the trial Judge (Record, p. 124), and, undoubtedly, all of the other machine men and their helpers, and the miners and muckers, were fellow-employes of Fred Whitsett.

Under these circumstances, it is immaterial where the Whitsett brothers worked in the mine, or whether they were able to choose their place of work. The real question is the *nature* of the employment, not who brought about the dangerous condition, or who directed the workmen. This is obvious from an examination of the facts of the various cases cited at pages 52 to 55 of the opening brief.

In

Consolidated Coal & Mining Co. v. Floyd, 51 Oh. St. 542; 25 L. R. A. 854,

Clay, the deceased, was employed at the time of his death in working a machine used in mining coal. With him at the time was a helper, Devault, who met his death by the same accident. The mine embraced a number of rooms in which cutting with the machine was done. The operation of the machine was to punch or jab the coal and so make a bearing in and under the coal for the driller, who followed and drilled holes in the face of the coal. The driller was succeeded by the filler and poster. Three sets of men were thus engaged in the room at different times and at distinct employments. One Dalton was the filler and poster. He was required to shoot down the coal, fill it into cars, prop the roof where necessary and get the room ready for Clay's machine. The machine required about two and one-half hours in each room and ten rooms were usually assigned to one machine. Clay and Devault were killed by the falling upon them of a piece of slate from the roof of the room in which they were working.

Here we have a case in which the employes did not select their place of work and in which they were moved about from room to room, as the Whitsett brothers were moved about from face to face in the mine of plaintiff in error, and in which the negligence, if any, was that of Dalton, a fellow-servant. Under these facts, the exception to the rule requiring the employer to furnish a reasonably safe place for his employes to labor, was held to apply.

In

American Bridge Co. v. Seeds, 144 Fed. 605; 11 L. R. A. (N. S.) 1042,

plaintiff below was a bridge builder and in doing the work of removing an old railroad bridge and constructing the new one, he was a member of a gang that removed the materials of the old bridge. There were several gangs in charge of several foremen, respectively, each gang having its particular work, and the parts of the work which these gangs should do were assigned to their foreman by a general superintendent. It seems that the plaintiff below was taken from his work of removing the materials of the old bridge and told to adjust a chain and tackle fall around the piece of iron that was to be hoisted, and which piece of iron on being lifted, knocked him off of the staging erected alongside of the bridge. The work was done in the presence and under the directions of the foreman. One of the contentions made on behalf of Seeds was that the bridge company should have entirely floored the staging upon which he stood in adjusting the chain

and tackle fall. As we have seen in the opening brief, under this state of facts, the bridge company was held not liable.

The facts in the case of

Anderson v. Daly Mining Co., 16 Utah 28; 50 Pac. 819,

are as follows: Plaintiff worked in defendant's mine, which employed three shifts. Blasting was being done in the bottom of the shaft, and the reports counted as each blast took place to ascertain if there were any missed-shots. The men were in charge of pushers and all were under one general foreman. The shift preceding plaintiff's went off work, leaving an unexploded shot, the explosion of which caused the injury to plaintiff. Here the missed-shot was caused by the fellow-employes of plaintiff. Plaintiff had absolutely no discretion as to where or how he would work.

In

Armour v. Hahn, 111 U. S. 313; 28 L. Ed. 440,

Hahn was engaged as a carpenter in the erection of a new building. Bricklayers and other laborers were also at work upon it. Hahn, who had been working on one end of the roof, went to the other end and was there set to work by the foreman upon the cornice. This was made by inserting in the brick wall of the building at intervals of eight or nine feet and at right angles to it sticks of timber projecting about sixteen inches from the wall.

The defendant in error was instructed to place a joist sixteen or eighteen feet long and two and one-half inches wide on the outer ends of the projecting timbers. In order to do this work, plaintiff got out upon one of the projecting timbers, which tipped over, causing him to fall and suffer the injuries complained of. He had nothing to do with placing the timber that caused the accident. The Supreme Court said on these facts that:

> "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows."

Here the case turned on the nature of the work, not on how it was done.

In

> *Thompson v. California Construction Co.,* 148 Cal. 38,

plaintiff appears to have been a common laborer. Defendant was working a rock quarry and blasting rock. The large irregular pieces of rock so obtained were loaded upon cars. It was plaintiff's duty to assist in the loading operation by attaching chains around the pieces of rock, and when not so engaged, he shoveled dirt. While chaining a rock, another one slipped down the face of the cliff upon him and injured him. A new trial was granted by the Court

below on the ground that the trial Court had erred in instructing the jury that it was the duty of the employer to furnish the employe with a reasonably safe place in which to work, etc., and on the appeal it was further contended that the trial Court had erred in denying defendant's motion for a nonsuit, and the order granting the motion for a new trial was affirmed. The rule contended for by plaintiff in error was held to apply.

Without further consideration of the cases cited in the opening brief, the foregoing are sufficient to establish that the position of counsel is not well taken. Neither are his authorities applicable.

The case of

> *Rocky Mountain Bell Telephone Co. v. Bassett,* 178 Fed. 768,

is a case where the employer knew of the defect that caused the accident and injury, and the employe did not know of it. Besides, the Court, in passing on the case, distinctly recognizes the rule for which I contend (see p. 770).

The case of

> *Corby v. Missouri & K. Tel. Co.* (Mo.), 132 S. W. 712,

is entirely different from that at bar. There, plaintiff was a lineman in the employ of a telephone company, and was injured by a fall caused by the breaking of a wooden pole upon which he was working. The negligence charged in the complaint is that defendant negligently ordered plaintiff to go upon

said pole when it knew, or by the exercise of ordinary care should have known, that said pole was rotten, weak and defective. It was insisted that the rule here contended for by the plaintiff in error was applicable. The Court, however, and properly, said that it was not.

There are many cases growing out of injuries to telegraph and telephone linemen resulting from the falling of poles, and they all turn on a different principle of law from that under consideration.

The case of

> *Reid Coal Co. v. Nichols,* (Tex.) 136 S. W. 847,

was one with which the Court seemed to have great difficulty, but it finally expressly followed the Corby case.

> *Allen v. Bell*, (Mont.) 79 Pac. 582,

is altogether different. In that case there was an express assurance by the foreman to the workmen that the blast, by which plaintiff was injured, had been exploded before plaintiff went into the mine. The rule under consideration is expressly recognized, the Court saying:

> "But this rule does not justify a master in neglecting to give information known to him, etc. * * * Much less does it justify him in giving false information regarding any danger."

I again assert that under the facts of the case at bar, the duty of the employer to furnish his employe with a safe place in which to work was one that

could be delegated; that under the pleadings, Yokum was a fellow-servant of the Whitsett brothers; and that plaintiff in error is not liable for any negligence on its part in the matter of making inspection for missed-shots. The evidence does not show that any duty rested upon the foreman to make inspections or to furnish the various employes of the mining company with a safe place in which to work. But if, for the purposes of the argument, we concede that such duty did rest on the foreman, then he, too, was a fellow-servant of the Whitsett brothers.

> *Poorman Silver Mines Co. v. Devling,* 34 Colo. 37; 81 Pac. 252; 18 Am. Neg. Rep. 308.

IV.

AS TO ERRORS NUMBERED XLIV AND XLV.

The only answer that counsel makes to this point is a contention that the principle of law involved in the requests refused by the Court has no application to this case. Of course, that must necessarily be his contention. That is the only answer that he can make, but, in view of what has gone before, it is to be seen that the legal principle involved is applicable to this case, and that the requests should have been given to the jury.

The question of time is immaterial. If the Whitsett boys or their fellow-servants, in the progress of

their work as miners, at any time rendered this place dangerous, then the rule is applicable, and there was no duty on the part of plaintiff in error to follow in the footsteps of its employes and discover at all hazards every unexploded charge of dynamite that might be in the mine.

V.

AS TO ERROR NUMBERED XXVI.

As stated in the opening brief, at the conclusion of the case of plaintiff in the Court below, a motion was made to strike out all of the testimony relative to the incompetency of Yokum. As has been seen, no sufficient proof of such incompetency was before the Court. In other words, counsel had failed in his proof in this particular, and it was, therefore, a proper motion and should have been granted. It was not a question to go before the jury. The burden of proof being on the plaintiff below, the question of incompetency could not be left to the jury, unless there was proper and sufficient evidence establishing such incompetency. There was no such evidence, and it did not lie with the jury to guess that Yokum was incompetent. Counsel, however, says that it was the duty of the plaintiff in error to request appropriate instructions on the subject. Such an instruction was proposed (see Error 48, p. 65, Opening Brief) and refused.

VI.

AS TO ERRORS NUMBERED XLIX, L AND LI.

Counsel does not answer the contentions of plaintiff in error on this point. All that he advances may be admitted and still the argument in the opening brief is unanswered. Under the testimony set forth on pages 61 and 62 of the opening brief, it was for the jury to determine whether or not the employment of a missed-shot man entirely relieved the Whitsett brothers from their duty to look out for and discover missed-shots. It was, therefore, error for the trial Judge to instruct the jury that if the plaintiff in error provided a missed-hole man, whose duty it was to detect missed-shots, then the Whitsett brothers had the right to rely on his inspection and assume that he had done his duty in that regard *"and would not be guilty of negligence for failing to make such inspection"* themselves. It was clearly the contention of plaintiff in error, well supported by evidence, that it was the duty of the Whitsett brothers to make such inspection, and, there being a conflict in the evidence upon that point, the question of fact was one for the jury and should have been submitted to them under appropriate instructions. It did not lie with the trial Judge to determine, as matter of law, that the failure of the Whitsett brothers to make such an inspection would not constitute contributory negligence.

The interpretation given by counsel of the instructions embraced in Errors L and LI is certainly extraordinary. Undoubtedly it must be admitted

that Frank Whitsett, at least,—and he was the fellow-servant of Fred Whitsett in this case,—could make as thorough and satisfactory inspection for missed-shots as Yokum. If, therefore, he could not discover the missed-shot in question because of its being concealed, then, as the charges under consideration say, the defendant below is not liable, because the defect was so concealed as to defy detection and deceive human judgment.

I cannot understand what the case of

Scott v. San Bernardino Valley Traction Co., 152 Cal. 604,

has to do with this case. That case arose out of a collision between a street car and a buggy. It has nothing to do with the law of master and servant, nor can it determine the measure of duty owed by an employer to his employe.

VII.

AS TO ERROR NUMBERED XLVIII.

Answering this point, counsel contends: First, that the instruction is inaccurate in many respects. Second, that the Court fully and correctly instructed the jury on the question of Yokum's incompetency. And, finally, conceding the error, he says that it was without prejudice.

As to his first answer, he neglects to set forth wherein the proposed instruction is inaccurate. It

would seem, therefore that we may disregard this answer.

As to the second, however fully the jury may have been instructed, they were not told that before they could find their verdict on the theory that Yokum was an incompetent fellow-servant, they must find that he "was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made the inspection of the face of the cross-cut where the accident occurred". This is the law and plaintiff in error was entitled to have it given to the jury.

Finally, as to the third answer of counsel that the plaintiff in error was not injured by the refusal of the trial Court to give the instruction under consideration, for the reason that the evidence is sufficient to establish negligence without reference to any incompetency on Yokum's part, it is to be said that this is exactly what the evidence does not establish. No matter how the evidence be read, we cannot escape the conclusion that the missed-shot in this particular case was so concealed that it could not be discovered by the exercise of ordinary care. It was a hidden danger.

There is, therefore, no evidence in this case establishing that Yokum was an incompetent workman or that his incompetency proximately caused the accident and injury complained of, or that defendant below was guilty of any negligence proximately caus-

ing the accident and injury to plaintiff in failing to discover the missed-shot.

As to the second paragraph of this proposed instruction, which is quoted at length on page 68 of the opening brief, counsel says that it leaves out of consideration the questions of ordinary care and proximate cause. This instruction is according to defendant's theory of this branch of the case and is amply supported by the evidence. The questions of ordinary care and proximate cause are dealt with elsewhere in the charge. Numerous witnesses testified that it was the duty of the Whitsett brothers to examine for missed-shots. If this was their duty and they failed to perform it, or performed it in a careless manner, then no recovery can be had, because of their contributory negligence. If, on the other hand, they did perform their duty in this particular carefully, but failed to discover the missed-shot, then no recovery can be had, because the missed-shot was so concealed that it was a hidden danger, which could not have been discovered by the exercise of ordinary care.

Concluding his brief, counsel says, as I read his words, that the judgment in this case should be affirmed because the verdict is exceedingly small. Possibly to him the sum of five thousand dollars is of little consequence, but however that may be, the justice of the case can hardly be determined by

the size of the verdict. Justice cannot be measured by the freedom, or lack of freedom, with which a jury undertakes to do charity with the money of a corporation. On the argument, counsel suggested that this was not a proper interpretation of his closing remarks, but that we should rather construe them as expressions of concern on his part over the mistaken and misguided judgment of plaintiff in error in taking this appeal "against its own ultimate interest". If this be the true interpretation to be placed on the language of counsel, the plaintiff in error certainly appreciates his disinterested advice, yet, it cannot but ask why it should be required to pay an unjust,—an unlawful—verdict.

For these reasons, it is insisted that the points made in the opening brief in this case are controlling, and that this Court should correct the errors of the District Court by reversing the judgment here complained of.

Dated, San Francisco,
December 9, 1914.

C. H. Wilson,
Attorney for Plaintiff in Error.